The People's Insurance Co (M) Bhd v Sykt Kenderaan Melayu Kelantan Bhd

HIGH COURT (KOTA BAHRU) — CIVIL APPEAL NO MT(2)12–9 OF 2000
SURIYADI J
8 AUGUST 2000

Civil Procedure *— Appeal — Record of appeal — Extension of time to file — Photostat copy of decision appealed from filed in record of appeal — Whether an irregularity — Whether time should be extended to enable certified true copies of decision to be filed*

The sessions court gave judgment for the respondent. The appellant filed a notice of appeal. Pursuant to O 49 r 3A(3) of the Subordinate Courts Rules 1980 ('the SCR'), the appellant was required to file the record of appeal within six weeks thereof. The appellant filed the record of appeal within the time limited but the record of appeal did not contain the sealed certified true copies of the court's decision. Instead photostat copies of the decision were inserted. Upon discovering the mistake and wishing to remedy the procedural irregularity the appellant filed an application by way of notice of motion for enlargement of time to file a supplementary record of appeal containing the sealed copy of the decision appealed against.

Held, allowing the application:

(1) Although the application did not cite the provision under which the court could extend time, it is logical that the relevant empowering provision alluded to was O 3 r 5 Rules of the High Court 1980 ('the RHC') which enables the court, on such terms as it thinks just, to extend or abridge time (see p 23C).

(2) The court would remedy the irregularity under O 2 r 1 of the RHC, inter alia, because: (a) if not for the court's decision being photostat copies, there was no difference between them and the certified true copies of the sealed decision; (b) the respondent knew of the court's decision and was never prejudiced by the insertion of the photostat copies. To deprive the appellant of the right of appeal merely on some irregularity would not do any justice to anyone; and (c) the appellant had filed the photostat copies in time and had acted promptly after being informed of the irregularity (see pp 22H–I, 23A–B).

(3) Even though the flaws envisaged under O 2 r 1 of the RHC are curable irregularities, on discovery of the flaws, steps must be taken to correct them (see p 22G–H).

[Bahasa Malaysia summary

Mahkamah sesyen telah memberi penghakiman untuk penentang. Perayu memfailkan satu notis rayuan. Menurut A 49 k 3A(3) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), perayu dikehendaki

memfailkan rekod rayuan dalam tempoh enam minggu selepas itu. Perayu memfailkan rekod rayuan dalam tempoh yang dihadkan tetapi rekod rayuan tidak mengandungi salinan diakui benar bermeterai keputusan mahkamah. Sebaliknya, salinan fotostat keputusan dimasukkan. Apabila mengetahui kesilapan tersebut dan berhasrat memulihkan luar aturan bersifat prosedur tersebut, perayu memfailkan satu permohonan melalui notis usul untuk perlanjutan masa untuk memfailkan rekod rayuan tambahan yang mengandungi salinan bermeterai keputusan yang dirayu.

Diputuskan, membenarkan permohonan tersebut:

(1) Walaupun permohonan tidak menyebut peruntukan di bawah mana mahkamah boleh melanjutkan masa, adalah munasabah bahawa peruntukan relevan yang memberikan kuasa sedemikian yang dirujuk secara tidak langsung adalah A 3 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang membolehkan mahkamah, atas terma yang dianggapnya saksama, melanjutkan atau memendekkan masa (lihat ms 23C–E).

(2) Mahkamah akan memulihkan luar aturan di bawah A 2 k 1 KMT, antara lain, kerana: (a) andainya keputusan mahkamah bukan salinan fotostat, tiada perbezaan di antara mereka dan salinan diakui benar keputusan bermeterai; (b) penentang tahu tentang keputusan mahkamah dan tidak pernah diprejudiskan akibat kemasukan salinan fotostat. Untuk melucuthak perayu untuk merayu semata-mata atas suatu luar aturan tidak akan bertindak adil pada sesiapa; dan (c) perayu telah memfailkan salinan fotostat menepati masa dan telah bertindak dengan segera selepas diberitahu tentang luar aturan tersebut (see pp 22H–23B).

(3) Walaupun ketidaksempurnaan yang dibayangkan di bawah A 2 k 1 KMT adalah luar aturan yang boleh dipulihkan, apabila kecacatan didapati, langkah-langkah mestilah diambil untuk membetulkannya (lihat ms 22G–H).]

Notes

For cases on record of appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 865–890.

Cases referred to

Ban Hin Lee Bank Bhd v Long Hua Corp Sdn Bhd & Ors [2000] 2 MLJ 244 (refd)

Bank Bumiputra (M) Bhd v Syarikat Gunong Tujoh Sdn Bhd & Ors [1990] 1 MLJ 298 (refd)

Harkness v Bell's Asbestos and Engineering Ltd [1966] 3 All ER 843 (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)
Leal v Dunlop Bio-Processes Ltd [1984] 2 All ER 207 (refd)
Lim Yoon Loy v Lee Lan [1990] 2 MLJ 425 (refd)
Malaysia Building Society Bhd v Lesco Development Corp Sdn Bhd & Ors [1988] 3 MLJ 273 (refd)
Maranatha Tours & Travel Sdn Bhd v Ampang Specialist Centre Sdn Bhd Civil Appeal No R3–12–99 of 1996, High Court Kuala Lumpur (refd)
Maritime (Pte) Ltd v EPTM SA [1988] 2 MLJ 289 (refd)
Metroinvest Anstalt v Commercial Union Assurance [1985] 2 All ER 318 (refd)
Pritchard, Re [1963] 1 All ER 873 (refd)
Sii Toh Sing v Hung Ming Chung [2000] 2 MLJ 204 (refd)
Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd [1996] 2 CLJ 130 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 r 1(1), (2), O 3 r 5, O 42 r 12
Rules of the Supreme Court 1965 [UK] O 2 r 1
Subordinate Courts Rules 1980 O 49 rr 3A(3), 6(3)

Zamzuri bin Husin (*Foo Say Ghee & Zamzuri*) for the appellant.
C Jegathesan (*C Jegathesan*) for the respondent.

Suriyadi J: On 20 February 2000, the sessions court judge gave judgment against the applicant pursuant to Kota Bharu Civil Action 52 of 1995. On 2 March 2000 the applicant filed a notice of appeal. On 18 April 2000 the latter received notification from the court stating, inter alia, that the notes of proceedings were ready and available for collection. Pursuant to O 49 r 3A(3) of the Subordinate Courts Rules 1980 ('the SCR'), two copies of the appeal records were required to be filed into court within six weeks of that notification, with 28 May 2000 being the last date. Those appeal records must contain, among others, copies of the relevant pleadings, notes of evidence and the decision. The applicant dutifully filed the two appeal records on 21 May 2000 and thus had them filed within time. These facts were beyond reproach and hence not disputed by the respondent. The flaw committed by the appellant was that, due to an oversight the sealed certified true copies of the court decision were not filed in those Records of Appeal. Instead, photostated copies had been inserted. It was upon discovery of that mistake, and wishing to remedy the procedural irregularity, and desiring to insert sealed certified true copies of the court order that the applicant filed the said encl 8. To appreciate the matter at hand, I herewith reproduce the translated version of encl 8:

> TAKE NOTICE that the court will be moved on 18 July 2000 at 9am or as soon as can be heard counsel for the appellant/defendant above-named for an order that leave be given by this honourable court for an extension of time and

to file the supplementary appeal records containing the sealed copy of the subordinate court's ordera dated 20 February 2000. A

Dated 3 July 2000

sgd ... sgd ... B

Counsel for the appellant High Court, Kota Bharu

This enclosure, coming by way of a motion notice, had prayed for an enlargement of time for purposes of filing a supplementary record of appeal. The application was made on 2 July 2000, two to three days after receipt of a letter dated 29 June 2000 from the respondent, indicating its intention to pose a preliminary objection founded on the above irregularity. In the course of the hearing, the applicant was magnanimous in admitting that, had it not been for the respondent's warning it would have been oblivious of the flaw. There was no delay in its remedial action as encl 8 was filed quite promptly. C D

The respondent, as expected, ventilated that the flaw here was fatal and prayed for a dismissal of the motion notice, on the premise that the rules in the SCR must be accorded a severe pronouncement. Echoing the mandatory words of O 49 r 6(3) of the SCR for analogy purposes, learned counsel for the respondent strenuously argued that the court was bereft of discretion, hence that stance (*Sii Toh Sing v Hung Ming Chung* [2000] 2 MLJ 204; *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 CLJ 130; *Maranatha Tours & Travel Sdn Bhd v Ampang Specialist Centre Sdn Bhd* Civil Appeal No R3–12–99 of 1996, High Court Kuala Lumpur)). It was held in the latter case, as reported in 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) at para 873 that: E F

> The appellant could not blame the other party if he himself did not have the sealed judgment and order of the court. It was after the preliminary objection that the appellant's counsel took steps to rectify the error ... . The requirements of O 49 r 6(3) of the Rules were mandatory and non-compliance rendered the dismissal of the appeal. G

To wind up the matter, despite the respondent stressing that O 2 r 1 of the Rules of the High Court 1980 ('the RHC'), in the circumstances of the case was inappropriate and inapplicable, I still dismissed the objection. I thenceforth granted the application.

To fully appreciate my grounds, it is desirable that I start off by reproducing O 2 r 1(1) and (2) of the RHC. They read: H

> 1 Non-compliance with rules
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the I

A proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to para (3), the court may, on the ground that there has been such a failure as is mentioned in para (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in B those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) ...

C The above provisions are in pari materia with O 2 r 1 of the Rules of the Supreme Court 1965 ('the RSC'). *Halsbury's Laws* (4th Ed), Vol 37 paras 36–37 authored:

> This is one of the most beneficent rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-
> D compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity ..... which the court can and should rectify as long as it can do so without injustice.

The *Malaysian High Court Practice* (1998 Desk Ed) Vol 1 at p 7, which accorded the same treatment, reads:

E

> There is no practical distinction between a non-compliance which rendered proceedings a nullity in which case the court had no discretion but to set it aside, and a non-compliance which was a mere irregularity and therefore curable by a suitable amendment, on terms.

F Lord Denning in *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 at p 7, had occasion to clarify that the promulgation of O 2 r 1 of the RSC was to get over the decision of *Re Pritchard* [1963] 1 All ER 873 which differentiated proceedings that were a nullity or irregular. With the inception of this new provision, any failure to comply with the new rule is to be treated as an irregularity and not as a nullity. His Lordship in distinct G terms opined:

> This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforth to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.

H Cummings-Bruce LJ in *Metroinvest Anstalt v Commercial Union Assurance* [1985] 2 All ER 318 had occasion to approve the above comments of Lord Denning, and further remarked at p 324:

> But I would construe O 2 r 1(2) as being framed as to give the court the widest possible power in order to do justice.

I A perusal of the above cases will show that English courts lay much stress on the avoidance of injustice and prejudice against the other party, with the attainment of justice as the eventual by-product. I am in total agreement

with the above dissertation of the law regarding the approach of courts pertaining to O 2 r 1, and can only add that the court must scrutinize all the available facts and circumstances before applying its discretion (see also *Leal v Dunlop Bio-Processes Ltd* [1984] 2 All ER 207; *Bank Bumiputra (M) Bhd v Syarikat Gunong Tujoh Sdn Bhd & Ors* [1990] 1 MLJ 298). Anything less would be, to resort to the words of Slade LJ, as if the court's eyes were 'in blinkers'.

The local judiciary, likewise, has not been deprived of its fair share of authorities with regard to the provision under discussion. The Court of Appeal in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 had no qualms in accepting the approach of Gumming-Bruce LJ in *Metroinvest Anstalt*. In succinct terms, Gopal Sri Ram JCA at p 853 remarked:

> After the coming into force of the Rules of the High Court, 1980 th distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities and not nullities.

Sulong Matjeraie JC in *Ban Hin Lee Bank Bhd v Long Hua Corp Sdn Bhd & Ors* [2000] 2 MLJ 244 similarly echoed the same sentiment, whereby his Lordship held that the failure to state the amount claimed in the endorsement of claim column in the writ had not prejudiced the defendant. That failure was a mere irregularity that amounted to non-compliance with one or more of the provisions of the RHC, curable under O 2. In *Lim Yoon Loy v Lee Lan* [1990] 2 MLJ 425, the court held that the non-service of the notice of appeal in the circumstances of the case was a curable irregularity. In the Singapore case of *Maritime (Pte) Ltd v EPTM SA* [1988] 2 MLJ 289, even though the breach by the plaintiff was serious, but there being no prejudice caused on the defendant, the irregularity was cured. For that matter in *Malaysia Building Society Bhd v Lesco Development Corp Sdn Bhd & Ors* [1988] 3 MLJ 273, Siti Norma Yaakob J even confirmed the decision of the SAR, who had earlier allowed an application in spite of the seriousness of the flaw. The facts revealed that there was non-compliance of O 42 r 12 of the RHC, whereat the permitted interest was 8%, instead of the judgment interest of 13.5%. Despite that mistake the court still invoked O 2 r 1. The interest amount thereafter was amended accordingly. It must be emphasized that even though the flaws envisaged under O 2 of the Rules of the High Court 1980 are curable irregularities, on discovery of the flaws steps must be undertaken to right them. Unless there are good grounds, the relevant court will not take any in action by the defaulting party too kindly, when in the process of applying its discretion.

In the current case I find these factors, inter alia, to favour the applicant viz:

1 the action of the applicant was prompt after being informed of the irregularity;

2 the photostated copies of the court decision had been filed within time;

A 3 the respondent knew of the appeal;

4 the respondent knew of the court's decision and was never prejudiced merely by the insertion of the photostated copies;

5 to deprive the applicant of the right to appeal merely based on some irregularity surely would not do any justice to anyone; and

B 6 if not for the court's decision being photostated copies, there was absolutely no difference between them and the certified true copies of the sealed decision. Clearly this merely emphasizes my conclusion that the irregularity was merely in respect of form, and thus within the absolute purview of O 2 r 1 to be cured.

C Even though encl 8 did not recite the provision under which the court could extend time, it was logical that the relevant empowering provision alluded to was O 3 r 5 of the RHC. This provision enables the court, on such terms as it thinks just, to extend or abridge the period within which a person is required or authorized by the rules or by any judgment, order or direction, to do any act in any of the proceedings. Based on all the above-stated D reasons, and after concluding that the flaw here was a curable irregularity merely in respect of form, and no injustice would befall the respondent, I accordingly exercised my discretion and thenceforth granted the application. Time thus was extended so as to enable the applicant to file the supplementary appeal records in which would contain the sealed certified true copies of the court order.

E

Order accordingly.

Reported by Andrew Christopher Simon

F

G

H

I